BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAY VOIERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,031,247
MIDWAY WHOLESALE	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the December 15, 2006, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is a claim for a low back injury. In the December 15, 2006, Order for Compensation, Judge Avery granted claimant medical benefits and temporary total and temporary partial disability benefits after finding claimant sustained a series of accidental injuries through September 15, 2006, arising out of and in the course of his employment with respondent. The Judge also found claimant provided respondent with timely notice of his accidental injury.

Respondent and its insurance carrier contend Judge Avery erred. They argue claimant failed to prove he sustained a series of accidental injuries arising out of and in the course of his employment with respondent. Instead, they assert the evidence establishes that claimant strained his back on August 30, 2006, and that date should be the date of accident. Respondent and its insurance carrier also argue claimant failed to provide respondent with timely notice of his work injury should the date of accident be August 30, 2006. Further, they contend an emergency room visit and subsequent hospitalization and surgery for a herniated disc are not related to his work injury and the Judge erred by ordering respondent and its insurance carrier to pay medical bills associated with the hospitalization and surgery as authorized medical benefits.

In short, respondent and its insurance carrier request the Board to deny claimant's request for benefits. In the alternative, they request the Board to find claimant's herniated disc did not arise from his employment with respondent and that they are not obligated to pay the bills related to claimant's hospitalization and surgery.

Conversely, claimant contends the preliminary hearing Order for Compensation should be affirmed. Claimant argues he sustained repetitive trauma to his back from August 30 through September 15, 2006. In addition, he argues he first told respondent of his back symptoms on September 6, 2006, when he mentioned his back was hurting from throwing shingles. In the alternative, should the date of accident be determined to be August 30, 2006, claimant argues the notice he provided respondent on September 15, 2006, was timely as there was just cause to extend the 10-day reporting period to 75 days as he believed respondent already had notice of his back injury due to the comments he made to respondent's manager on September 6, 2006.

The issues before the Board on this appeal are:

1. What is the date of accident for purposes of this claim?

2. Did claimant provide respondent with timely notice of his injuries?

3. Did the Judge exceed his jurisdiction and err in ordering the payment of certain medical bills?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Workers Compensation Board finds and concludes the preliminary hearing Order should be affirmed.

On or about August 30, 2006, claimant manually unloaded bundled shingles from pallets onto a conveyor that lifted the bundles to a roof. That activity was called throwing shingles. The bundles, which weighed approximately 80 to 90 pounds apiece, were stacked 36 to a pallet. About the fourth pallet, claimant felt a pull in his low back.

Claimant believes he experienced the pulling sensation on August 30, 2006. But he also believes that he unloaded shingles on both the day before and the day after August 30, 2006. In any event, claimant, who regularly performs strenuous manual labor and experiences the resulting aches and pains, did not place much importance on the initial low back symptom. Accordingly, claimant did not immediately report the symptom to respondent and, instead, continued to perform his assigned work.

Claimant is paid every Wednesday. On Wednesday, September 6, 2006, claimant was in respondent's offices to pick up his paycheck and obtain different orders and loads. According to claimant, at that time he casually mentioned to respondent's manager, Joel Dickey, that his back was bothering him from throwing shingles. At that point, claimant was neither seeking medical treatment nor requesting to complete an accident report or asking for time off work. Claimant picked up his check and returned to work. Mr. Dickey does not recall claimant mentioning his back complaints on that occasion.

Later, according to claimant, he told Mr. Dickey that he was going to see a chiropractor for his back. That conversation allegedly took place on either September 8 or 11, 2006. Again, Mr. Dickey does not recall that conversation. Claimant, however, recalls Mr. Dickey stating that if claimant could not get in to see the chiropractor to let Mr. Dickey know and claimant could go to Promptcare (where respondent sent its injured workers).

Despite his low back symptoms, claimant continued to perform his work activities, including throwing shingles. But that changed on September 15, 2006, when claimant's symptoms progressively worsened to the point that he was having difficulty walking. Mr. Dickey was advised of claimant's condition and sent him for medical treatment at Lawrence Promptcare.

When claimant saw Promptcare on September 15, 2006, he provided the following history:

> Was throwing shingles on the conveyor track[.] [F]elt twinge or pull in my back[.] [D]idn't think much about it. Now & few weeks later can really feel it.[1]

Claimant noted the date of accident was August 30, 2006. But the history in the doctor's notes from the September 15, 2006, appointment indicated claimant's symptoms began on August 29, 2006. The doctor noted:

> The patient presents with a complaint of back pain, which started on August 29th when he was doing his regular job of loading bundles of shingles from pallets onto conveyor belts, which are raising them to roof level. These bundles of shingles weigh as much as 100 lb. or so each and he loads over 100 of these per day typically. He was taking ibuprofen and using hot packs at night and getting by pretty well until the last three or four days when the pain has become worse and worse and difficulty sleeping and doing his job. He gets some "pins and needles" in his

[1] P.H. Trans., Resp. Ex. C.

> feet sometimes when he is sitting for a long period of time or driving in the truck. . . .[2]

Dr. Keith Sargent at Promptcare diagnosed back strain.

Date of accident and notice

Based upon the nature of claimant's job throwing shingles, this Board Member finds that it is more likely true than not true that claimant's low back injury resulted from a series of repetitive traumas. Accordingly, whether the repetitive trauma that led to that injury occurred on August 30, 2006, or whether the repetitive trauma continued through September 15, 2006, which is the more likely scenario, the date of accident as dictated by K.S.A. 2006 Supp. 44-508 is the same.

For repetitive trauma injuries, the Workers Compensation Act designates the accident date to be the date the authorized physician prohibits the worker from working or the date the physician restricts the worker from performing the work that caused the repetitive trauma injury. K.S.A. 2006 Supp. 44-508(d) provides, in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition.

And in this instance, on September 15, 2006, the doctor at Lawrence Promptcare placed restrictions on claimant that prevented him from throwing shingles. Consequently, September 15, 2006, is the designated date of accident for this low back injury. Moreover, as respondent and its insurance carrier admit receiving notice of claimant's back injury on September 15, 2006, the requirement of timely notice is satisfied.[3]

Medical bills

Respondent and its insurance carrier challenge the Judge's order to pay the bills for claimant's emergency room visit, hospitalization and low back surgery. They argue that claimant's initial diagnosis was merely a back strain and, therefore, claimant's hospitalization and the surgery he received for a herniated disc were not related to his work-related back injury.

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[2] *Id.*

[3] See K.S.A. 44-520.

Claimant's evidence would have been stronger if he had presented a medical opinion to specifically relate his back surgery to the low back injury he sustained while working for respondent. Nonetheless, the undersigned finds it is more probably true than not claimant's low back surgery on October 4, 2006, was related to the injury he sustained while working for respondent. Claimant continued working for respondent through September 25, 2006. The next day he took his pregnant wife to the hospital. After claimant developed additional symptoms, which led to a September 28, 2006, emergency room visit and hospitalization, Dr. Michael Smith diagnosed a herniated disc and recommended the October 4, 2006, surgery.

Although respondent and its insurance carrier have the opportunity to develop additional evidence regarding what caused claimant's herniated disc, there is no evidence at this juncture that claimant sustained any subsequent accident or injury. Instead, the evidence establishes a progressive worsening of symptoms following the initial onset on or about August 30, 2006. Based upon the record as it presently exists, the medical bills claimant sustained on and after September 28, 2006, for his low back are related to the injury he sustained working for respondent.

Finally, respondent and its insurance carrier contend the Judge erred by ordering the payment of the medical bills claimant incurred on and after September 28, 2006, as authorized medical treatment. That issue, however, is not subject to review in an appeal of a preliminary hearing order as it is not a jurisdictional issue listed in K.S.A. 44-534a and the Judge did not exceed his jurisdiction in addressing that issue.[4] Consequently, that issue is dismissed.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[5]

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[4] See K.S.A. 44-534a and K.S.A. 2006 Supp. 44-551.

[5] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[6] K.S.A. 44-534a.

WHEREFORE, the Board affirms the December 15, 2006, Order for Compensation entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of March, 2007.

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge